



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MURGOR, J.J.A)

CIVIL APPLICATION NO. NAI. 203 OF 2016

BETWEEN

INTERCOUNTRIES IMPORTERS

AND EXPORTERS LIMITED.....APPLICANT

AND

TELEPOSTA PENSION SCHEME

REGISTERED TRUSTEES.....1ST RESPONDENT

COMMISSIONER FOR LANDS.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUBILEE INSURANCE COMPANY LIMITED...4TH RESPONDENT

PARK AVENUE INVESTMENTS LIMITED.....5TH RESPONDENT

TRUST BANK LIMITED (IN LIQUIDATION)....6TH RESPONDENT

(Being an application to set aside the Consent order dated 27th September 2016

between the applicant and the 1st respondent)

RULING OF THE COURT

In a Notice of Motion dated 15TH March 2017 *the applicant, Intercountries Importers and Exporters Limited* seeks to set aside the consent Order of 27th September 2016 made between the applicant and *the 1st respondent, Teleposta Pension Scheme Registered Trustees* and adopted by this Court. Also sought was an order for Total Security Limited and Le~ Molok Limited (*the Interested Parties*) to be joined to these proceedings as the 1st and 2nd Interested Parties respectively and for the costs of the application to be awarded to the applicant.

As a brief background to the application, Land Reference No. 209/13238 (originally LR No 209/2397) (*the suit property*) which is located on Muchai Road, off Ngong Road was originally owned by the East African Community Common Services. Later it became the property of East Africa External Telecommunications Company Limited (Extelecoms) (now defunct). In 2001, vide Legal Notice No. 133 of 1988 dated 11th March 1988, the Minister for Transport and Telecommunications ordered that all movable and immovable property vested in Extelecoms vest in the Kenya Posts and Telecommunications Corporations the 1st respondent. All the assets were thereafter transferred to the Corporation, while the suit property was to vest in the 1st respondent, to enable it discharge outstanding pension liabilities.

Meanwhile, by a letter of allotment dated 30th April 1996, the Commissioner of Lands allocated the suit property to *the 5th respondent, Park Avenue Investments Limited*, which later utilized it as a security for a loan of Kshs. 40,000,000 obtained from *the 4th respondent, Trust*

Bank Limited (in liquidation). The 5th respondent defaulted in the loan repayments causing the 4th respondent to exercise its statutory power of sale, and consequently, the suit property was sold to the applicant.

In a turn of events, the Chairman, the National Lands Commission (NLC) issued Gazette Notice no. 15325 of 6th December 2013, as amended by Gazette Notice No. CXV-No 178 of 20th December 2013, directing that the title of the suit property be revoked. In response, the applicant filed a petition dated 11th August 2014 in the High Court seeking to quash the NLC's orders, and in a judgment delivered thereafter, the court quashed the orders revoking the applicant's title to the suit property.

Subsequent thereto, the 1st respondent instituted proceedings against the other parties herein asserting that it was the proper owner of the suit property, which claim the applicant vehemently denied.

In a judgment delivered on 27th July 2016, the High Court (Ougo, J) found that the applicant was an innocent purchaser for value without notice, and therefore was the bona fide owner of the suit property.

The 1st respondent was aggrieved by the decision of the High Court, and filed an appeal to this Court. Simultaneously with filing of the Notice, the 1st respondent also filed *Civil Application No. Nai. 203 of 2016* where it sought orders for a stay of execution of the High Court orders. On 27th September 2016, the parties compromised the stay application in favour of a consent Order, which is the basis upon which this application has been brought.

The application to set aside the consent Order was made on the grounds that the parties entered into a consent Order dated 27th September 2016 which was stated to be in the following terms;

- a) Pending the hearing and determination of the intended appeals, the Applicant and the 1st respondent receive rents from the suit property in a joint interest earning account in the joint names of the Advocates for the Applicant and the 1st Respondent.*
- b) The Applicant is at liberty to enter into any lease agreement in respect of the suit property with effect from 1st November 2016 on such terms as are agreed by the Applicant's Advocates and the 1st Respondent's Advocate.*
- c) Costs of the Applicant's Application abide the outcome of the intended Appeals.*
- d) The Applicant will file its Appeal within 6 months from the 27th September 2016."*

And on the same day the parties entered into a further consent which stated as follows;

- a) "Lloyd Masika would advertise the property.*
- b) The parties would meet the costs of Lloyd Masika Limited.*
- c) The property would be offered for a lease of 1 year with a deposit of 6 months with the tenant offering the highest rent."*

It was further stated that the effect of the consent Order was to stay the execution of the High Court judgment which declared the applicant to be the owner of the suit property, and also ordered that the 1st respondent be evicted; that instead of the consent allowing the applicant to exercise limited rights of ownership, it was denied or deprived of those rights, because the 1st respondent had acted fraudulently or misrepresented the facts by disclosing only the existence of leases that were to expire on 31st October 2016, and failing to disclose that the Interested Parties had been granted fresh leases made on 25th March 2015 and which leases purported to render them as protected tenants. It was further stated that, the Interested Parties' leases produced before the Business Premises Rent Tribunal (Tribunal) differed from the ones produced before this Court, and that the 1st and 2nd respondents did not dispute the existence of the Interested Parties' leases that were created a month before the date reserved by the High Court for judgment. It was stated that the 1st respondent has admitted under oath in the Tribunal that it had misrepresented those facts; and that as a result of the 1st respondent's actions, it had become impossible to enforce the terms of the consent Order.

The application was supported by the sworn affidavit of **Naushad Abid** the General Manager of the applicant who to a large extent reiterated the facts set out in the grounds of the application.

In a replying affidavit sworn on 18th October 2018, **Peter K. Rotich** the Trust Secretary and Administrator of the 1st respondent deponed that he was aware of the consent Order of 27th September 2016, but that the further consent alluded to was not signed. It was further deponed that the inability to enforce the terms of the consent was the fault of the applicant and its advocates, and that the Tribunal was well within its mandate to grant orders to protect tenants who were at the risk of being evicted from the suit property by the applicant; that by so doing, no fraud or misrepresentation arose before the Tribunal. It was further deponed that, the leases produced before this Court were valid and were due to expire on 31st October 2016, and that the managing agents, Regent Management Limited had executed fresh leases for a period of two (2) years from 1st July 2015 to 30th June 2017, which leases were not brought to the attention of the applicant's advocates during the

pendency of the proceedings in the trial court as the tenancy arrangements were not the subject of dispute; that the new tenancy agreements only came to light when the Interested Parties rushed to the Tribunal to safeguard themselves from eviction by the applicant. Furthermore, it was deponed, the advocates were only aware of the leases that were due to expire on 31st October 2016, and that the 1st respondent was not obliged to disclose the existence of other leases to the trial court. The deponent averred that the current situation had resulted from the applicant's hard stance of intimidating and threatening the 1st respondent and the tenants to the extent that it had become impossible to lease out the suit property.

As concerns the consent Order before this Court, it was deponed that the consent was clear that any new leases or tenancies would be entered into upon agreement between the parties and that no additional rights were given to one party to the detriment of the other. Furthermore, it was pointed out that it was the applicant who was seeking to gain control and possession of the suit premises by offering a lease to its sister companies, and that there was reason to believe that Femtech Enterprises, one of the bidding companies, was a sister company of the applicant, which was contrary to the terms of the consent. In addition, the applicant has failed to sign the Kenya Commercial Bank account opening forms despite these having been forwarded to them.

The 1st respondent went on to aver that the consent can only be set aside on grounds of fraud, misrepresentation or mistake, and that the applicant had not established any fraud or misrepresentation or mistake on their part, and therefore there was no reason for it to be set aside. Finally it was deponed that this application was merely aimed at delaying the hearing of the 1st respondent's appeal in this Court that is, *Civil Appeal No. 293 of 2016 Teleposta Pension Scheme vs Intercountries Importers and Exporters Limited and 6 others* and that in the interest of justice the appeal be heard on its merits as a matter of priority.

When the parties appeared before us, learned counsel Ms. K. Kilonzo appeared for the applicant, learned counsel Mr. Bundotich appeared with Ms. Mathenge for the 1st respondent and learned counsel Mr. Limo appeared for the 6th respondent, but there was no appearance for the 2nd, 3rd, 4th, and 5th respondents despite serving of hearing notices on them.

In her submissions **Ms. K. Kilonzo** submitted that when the 1st respondent filed for an order of stay of execution, it attached two leases executed in 2006 which were for a period of 9 years and 3 months and which were due to expire in October 2016, that was, 30 days after the consent Order; that this was the basis upon which the consent Order was entered into by the parties. Counsel submitted that contrary to the terms of the consent, the 1st respondent had already entered into fresh leases with both the Interested Parties made on 25th March 2015, but which were not brought to either the applicant's or this Court's attention. Counsel asserted that for this reason, there was a mistake, misrepresentation or material non-disclosure of these leases, and therefore the consent Order entered was based on the wrong facts, so that, the threshold requirements for setting aside a consent order were satisfied.

Furthermore counsel argued, it was apparent from the replying affidavit, that those facts were in existence at the time of the consent Order, and that both Anne Mathenge and Mr. Bundotich, the 1st respondent's advocates were aware of their existence having been present when the counsel was signed.

On the issue of *lis pendens* and consents, counsel asserted that no party had the right to dispose of property when matters are in court, and that contrary to the doctrine, the 1st respondent had taken possession of the suit property after the decision of the High Court, and had leased it out.

Mr. Bundotich opposed the application and submitted that, the consent Order stated that rent payments were to be deposited in joint interest earning accounts, and that the applicant had refused to sign the account opening forms, and that in any event, an amount of about Kshs.3,840,000 was currently being held in a separate account

Regarding the failure to disclose the Interested Parties' leases, it was submitted that the 1st respondent was at liberty to enter into lease agreements on agreed terms, which it had done, and that the consent Order recorded was intended to secure income from the suit property in the event that the appeal did not succeed. It was argued that the main disagreement was that the applicant wanted its sister company to become a tenant, but when the lease agreement was not signed, the applicant returned to this Court to have the consent Order set aside. Counsel concluded that it was not demonstrated that the consent was entered into through misrepresentation or by fraud, and therefore the conditions for setting aside the consent order had not been satisfied.

Ms. Limo stated that the dispute was between the applicant and the 1st respondent and that the 6th respondent did not have any stake in the decision.

We have considered the application and the submissions of parties, and consider that the central issue for our consideration is whether the threshold requirements for setting aside the consent have been met. To do so, it will be necessary to consider whether the tests to be fulfilled have been satisfied.

The principles that appertain to setting aside of a consent orders are well established in a line of cases including ***Brooke Bond Liebig vs Mallya (1975) EA 266*** where Mustafa Ag. VP stated thus;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts

and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.

And in the case of *Flora N. Wasike vs Destimo Wamboko [1988] eKLR* Hancox JA cited *Setton on Judgments and orders (7th edition) vol 1 page 124*, and reiterated that;

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”

Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside. So, was this a case of fraud or misrepresentation

or mistake by the 1st respondent that would lead to setting aside of the consent order of 27th September 2016?

To begin with Black’s Law Dictionary defines “fraud” as;

“1. Knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime.”

The same dictionary defines misrepresentation as;

“1. The Act or an instance of making a false or misleading assertion about something, usu. with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.

2. The assertion so made; an incorrect, unfair, or false statement; an assertion that does not accord with the facts.

And “mistake” as;

“1. An error, misconception, or misunderstanding; an erroneous belief. 2. Contracts. The situation in which either (1) the parties to a contract did not mean the same thing, or (2) at least one party had a belief that did not correspond to the facts of law. As a result, the contract may be voidable.

The applicant’s case is that there were material facts comprising the existence of fresh leases executed for a period of two (2) years from 1st July 2015 to 30th June 2017 that were not disclosed to it by the time of entering into the consent Order. It was contended that the leases were not brought to the applicant’s advocate’s attention, and were only discovered after the concerned tenants filed cases in the Business Premises Rent Tribunal; that, the existence of the leases, was a material non-disclosure of the extant facts.

The averments make it clear that the application is based on misrepresentation or non-disclosure of material facts by the applicant, and therefore the question of fraud or mistake does not necessarily arise. In this regard, the 1st respondent has not denied the existence of the leases entered into between 1st July 2015 and 30th June 2017. It has also not been denied that the applicant or indeed this Court was not informed of their existence. The only leases mentioned were those due to expire on October 2016, which was 30 days after the consent Order was entered into.

The consent Order provided that, “...The Applicant is at liberty to enter into any lease agreement in respect of the suit property with effect from 1st November 2016 on such terms as are agreed by the Applicant’s Advocates and the 1st Respondent’s Advocate.” This would imply that, the applicant would have been at liberty to enter into fresh leases, if the only tenancy agreements were those due to expire 30 days after adoption of the consent order. The converse is also a possibility, that had it been aware of the other tenancy agreements of 1st July, 2015, it may not have been inclined to enter into the consent. Whatever the case, the information made available to the applicant did not amount to a full disclosure of the tenancies prevailing at the time the consent was entered into. We are therefore satisfied that the failure on the 1st respondent or its advocate’s part to disclose the other leases gave rise to a non-disclosure of material facts and has established a sufficient basis for setting aside the consent order.

Turning to the amendments to the consent Order referred to by Ms. Kilonzo, despite closely scrutinizing the record, we were unable to locate it, and for this reason do not think it is in order to address it.

As concerns the order to enjoin the Interested Parties to the application, this was not argued before us, and therefore, we decline to make any orders in respect of this prayer.

As such, the application is allowed, the consent order recorded on 27th September 2016 is hereby set aside. It follows that the main application, that is, *Civil Application No. Nai. 203 of 2016* filed on 2nd September, 2018 shall be and is hereby reinstated for hearing. We order that it be heard on a priority basis. The costs of this application shall abide by the outcome of the main application.

It is so ordered.

Dated and Delivered at Nairobi this 22nd day of February, 2019.

P.N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR